Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1997

WILLIAM S. GILCHRIST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court must ensure that a defendant receives the benefit of the plea agreement for which he bargained with the United States by permitting him the absolute right to withdraw from a breached 11(e)(1)(C) plea agreement which expressly provides that withdrawal of the guilty plea is the exclusive remedy in the event of a breach?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

The named appellant in the court of appeals and the petitioner here is William S. Gilchrist. The named appellee in the court of appeals and the respondent here is the United States of America. There are no corporate entities or parties to this proceeding.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI

The decision of the court of appeals in this case represents an unprecedented retreat from the jurisprudence of this Court that a defendant must receive the benefit of the plea agreement for which he bargained with the government. Disregarding this Court's holding in *Santobello v. New York*,

404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), that a promise made pursuant to a plea bargain must be fulfilled, the court of appeals refused to enforce the express remedial provision in the parties' binding plea agreement, but rather conditioned the exercise of this remedy upon the discretion of the sentencing court. Consideration by this Court of the issue presented here is necessary to preserve the integrity of the plea bargaining process by assuring fulfillment of promises made to a defendant in consideration for the entry of a plea of guilty. In addition, this petition calls upon this Court to resolve a direct conflict between the decision below and the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Mandell*, 905 F.2d 970 (6th Cir. 1990).

OPINIONS BELOW

The judgment and sentence of the United States District Court for the Middle District of Pennsylvania is not reported but is reprinted in the appendix at A-19 to A-35. The opinion of the United States Court of Appeals for the Third Circuit is reported at 130 F.3d 1131 (3d Cir. 1997), and is reprinted in the appendix at A-1 to A-17. Mr. Gilchrist filed a timely petition for rehearing containing a suggestion for rehearing in banc. On January 5, 1998, the court of appeals entered an Order denying the petition for rehearing and suggestion for rehearing in banc. The order of the court of appeals denying the petition is included in the appendix at A-36 to A-37. On January 22, 1998, the court of appeals stayed issuance of the mandate in this case until February 11, 1998. The Order is reprinted in the appendix at A-18.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 2, 1997. The order denying the petition for rehearing and suggestion for rehearing in banc was entered on January 5, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (e) Plea Agreement Procedure.
>
> (1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following: (A) move for dismissal of other charges; or (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or (C) agree that a specific sentence is the appropriate disposition of the case.
>
> The court shall not participate in any such discussions.
>
> . . .

> (4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Fed. R. Crim. P. 11(e).

Guideline § 6B1.3 of the United States Sentencing Guidelines provides:

> If a plea agreement pursuant to Rule 11(e)(1)(A) or Rule 11(e)(1)(C) is rejected, the court shall afford the defendant an opportunity to withdraw the defendant's guilty plea. Rule 11(e)(4), Fed. R. Crim. P.

U.S.S.G. § 6B1.3.

STATEMENT OF THE CASE

On April 2, 1996, a federal grand jury in the Middle District of Pennsylvania returned a two-count indictment against William S. Gilchrist. The indictment alleged that Mr. Gilchrist engaged in commercial bribery in violation of the Travel Act, 18 U.S.C. § 1952(a)(3), and conspired to commit an offense proscribed by the Travel Act in violation

of 18 U.S.C. § 371. The district court had jurisdiction over the federal criminal prosecution pursuant to 18 U.S.C. § 3231.

Although he was the obvious victim of extortion and vigorously asserted his innocence throughout this proceeding, Mr. Gilchrist reluctantly agreed to enter a plea of guilty to a lesser charge, misprision of a felony, 18 U.S.C. § 4, to avoid the risk that he would be sentenced to a more severe penalty if tried and convicted of the legally unwarranted allegations in the indictment and to avoid prejudice in a related civil proceeding. On December 9, 1996, Mr. Gilchrist and the United States entered into a binding plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure which embodied the specific sentence established by the parties as the appropriate disposition of the case. (A-38 to A-42) Pursuant to this rule, the parties stipulated and agreed that Mr. Gilchrist would be sentenced to a nine-month term of incarceration, a one-month period of home confinement, and a $10,000.00 fine. (A-40, ¶ 5) The parties further stipulated and agreed that, if the district court for any reason imposed a penalty more severe than the stipulated sentence, Mr. Gilchrist would be entitled to revoke his plea of guilty and plead anew. (*Id.*) In fact, this was the sole and exclusive remedy agreed to by the parties to cure any violation of the plea agreement.

At the April 22, 1997 sentencing hearing, the district court purported to accept the plea agreement but indisputably departed from its terms by imposing an unwarranted one-year term of supervised release in addition to the stipulated term of incarceration and home confinement. The district court did not offer Mr. Gilchrist the opportunity to withdraw from the

plea agreement and replead. As a result, Mr. Gilchrist was deprived of benefit of his bargain with the United States.

On May 1, 1997, Mr. Gilchrist appealed the invalid sentence to the United States Court of Appeals for the Third Circuit.[1] The court of appeals had jurisdiction over the appeal from the final sentencing order pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The court of appeals held that the district court breached the plea agreement by imposing an invalid term of supervised release, but refused to implement the exclusive remedy established by the parties to cure any breach of the plea agreement. Instead, the court of appeals remanded the matter to the district court to determine whether an appropriate remedy would be to require specific performance of the plea agreement or to permit Mr. Gilchrist to withdraw his plea.

REASONS FOR GRANTING THE WRIT

Recognizing the importance of plea bargaining to the administration of justice, this Court has held that a defendant who pleads guilty must receive the benefit of the agreement for which he bargained with the government. *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427 (1971). Thus, "when a plea rests in any significant

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[1] Concurring *dubitante*, Judge Becker wrongly presumed that Mr. Gilchrist desired to exercise his right to withdraw from the plea agreement because "a key witness has 'gone south.'" (A-17 n.4) This unwarranted conjecture is not true. Further, the United States did not and cannot contend that its factual or evidentiary position has been altered in any way since the entry of the guilty plea.

degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* The court of appeals, however, ignored this Court's holding in *Santobello* and refused to recognize and require enforcement of the terms of the plea bargain in this case. Moreover, it rejected the holding of the United States Court of Appeals for the Sixth Circuit in *United States v. Mandell*, 905 F.2d 970 (6th Cir. 1990), that a defendant is entitled to specific performance of an express remedial provision in a breached plea agreement. Accordingly, this Court should hear this case to resolve these conflicts and, more importantly, to safeguard the integrity of the plea bargain process by compelling enforcement of the promises offered as consideration for a plea of guilty.

The plea agreement in this case is authorized by Rule 11(e)(1)(C) which invites parties to avoid any uncertainty by agreeing upon a specific sentence as "the appropriate disposition of the case."[2] Fed. R. Crim. P. 11(e)(1)(C). Any departure from the terms of an 11(e)(1)(C) plea agreement frees the defendant from his commitment to plead guilty and

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[2] Rule 11(e) divides plea agreements into three types: under Rule 11(e)(1)(A), the government agrees to move for dismissal of other charges; under Rule 11(e)(1)(B), the government agrees to recommend or not oppose a particular sentence with the understanding that such a recommendation is not binding on the court; and under Rule 11(e)(1)(C), the government agrees that the defendant must receive a specific sentence or be allowed to withdraw his plea of guilty. Fed. R. Crim. P. 11(e)(1); *see also United States v. Hyde*, ___ U.S. ___, 117 S. Ct. 1630, 1633, 137 L. Ed. 2d 935 (1997). If the court rejects an 11(e)(1)(A) or (C) agreement, the defendant must be allowed to withdraw his plea. Fed. R. Crim. P. 11(e)(4). Under Rule 11(e)(1)(B), however, there is no need for rejection with opportunity for withdrawal in light of the nonbinding character of the sentence recommendation. Fed. R. Crim. P. 11(e)(1)(B).

entitles the defendant to replead. Fed. R. Crim. P. 11(e)(4); U.S.S.G. § 6B1.3. As a further means of ensuring the right to withdraw, the parties expressly contracted that Mr. Gilchrist would be afforded the opportunity to replead if the district court departed from the terms of the plea agreement. (A-40, ¶ 5)

The court of appeals erred by failing to recognize Mr. Gilchrist's absolute right to replead. Instead, ignoring this Court's teaching that a guilty plea and plea agreement are "'bound up together' in the sense that a rejection of the agreement simultaneously frees the defendant from his commitment to plead guilty," *United States v. Hyde*, ___ U.S. ___, 117 S. Ct. 1630, 1634, 137 L. Ed. 2d 935 (1997), the court of appeals purported to bind Mr. Gilchrist to the breached plea bargain even though his expectations when he entered his plea have not been fulfilled. The court of appeals, in effect, said to the district court: you may accept Mr. Gilchrist's surrender of the presumption of innocence, the privilege against compulsory self-incrimination, the right to a trial by jury, the right to confront his accusers, and may impose a penalty more severe than the guideline range, and, although his agreement to plead guilty was expressly conditioned upon a promise that has not been fulfilled, you may nevertheless bind him to his commitment to plead guilty. The failure of the sentencing court and court of appeals to honor the terms of the plea bargain violates Mr. Gilchrist's right to due process and seriously undermines the basis for the waiver of his constitutional rights.

Laboring under its fundamental misconception of the role of the sentencing court, the court of appeals held that the

district court has discretion to choose an appropriate remedy.[3] (A-9) The court of appeals cited as controlling a decision involving a breached 11(e)(1)(B) agreement which has no relevance to the present case. *See United States v. American Bag & Paper Corp.*, 609 F.2d 1066 (3d Cir. 1979).[4] (A-13) By applying 11(e)(1)(B) remedial precepts to cure a breached 11(e)(1)(C) agreement, the court of appeals utterly ignored the critical distinction between B and C agreements. The exercise of judicial discretion is preserved when a defendant pleads guilty pursuant to Rule 11(e)(1)(B), whereas parties to an 11(e)(1)(C) agreement expressly contract for the elimination of judicial discretion. Such a plea agreement removes all discretion from the sentencing court, both with regard to the sentence to be imposed and the available relief in the event the stipulated sentence is not imposed. By suggesting that the district court has the freedom to resentence Mr. Gilchrist, the court of appeals introduced an opportunity for the exercise of judicial discretion and thereby transformed the plea agreement

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[3] The court of appeals missed the point by focusing on whether the district court's breach was intentional. The inadvertence of a breach is immaterial. *Santobello*, 404 U.S. at 262, 92 S. Ct. at 499. Further, the remedial provision in the plea agreement made no exception for unintended or inadvertent violations of its terms. (A-40, ¶ 5)

[4] The court of appeals concluded that *American Bag* is "instructive" because the 11(e)(1)(B) agreement at issue in that case was "converted" into an 11(e)(1)(C) agreement. (A-11) The court of appeals misapprehended the role and authority of the sentencing court in the plea bargaining process. The sentencing court, which is not a party to a plea agreement and is not bound by its terms unless and until it has been accepted, cannot alter the parties' rights or obligations under a plea agreement or convert an agreement from one type to another. Further, it is the opportunity for the exercise of judicial discretion, however much the sentencing court might disclaim that discretion, that distinguishes the *American Bag* plea agreement from the traditional 11(e)(1)(C) agreement.

into an 11(e)(1)(B) contract notwithstanding the clear expectations and intentions of the parties.

Permitting the exercise of discretion constitutes a nullification of the remedial provision in the plea agreement and a judicial reformation of the terms of the stipulated plea bargain. With the exception of the court of appeals in this case, the courts of appeals are unanimous in recognizing that a sentencing court may not unilaterally modify or alter the terms of an 11(e)(1)(C) agreement. *See, e.g., United States v. Baird*, 109 F.3d 856, 869 (3d Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 243, 139 L. Ed. 2d 173 (1997); *United States v. Veri*, 108 F.3d 1311, 1315 (10th Cir. 1997); *United States v. Barnes*, 83 F.2d 934, 941 (7th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 156, 136 L. Ed. 2d 101 (1996); *United States v. Mukai*, 26 F.3d 953, 955 (9th Cir. 1994); *United States v. Cunavelis*, 969 F.2d 1419, 1423 (2d Cir. 1992); *United States v. Kemper*, 908 F.2d 33, 37 (6th Cir. 1990). Nevertheless, the court of appeals invited the sentencing court to ignore the express remedial provision.

The decision of the court of appeals conflicts with the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Mandell*, 905 F.2d 970 (6th Cir. 1990), which held, based on *Santobello*, that a sentencing court has no discretion to remedy a breached 11(e)(1)(C) agreement by imposing the stipulated sentence where the agreement itself provides for the exclusive remedy of withdrawal in the event of a breach. Considering a remedial provision identical to the one in the present case, the Sixth Circuit concluded that the sentencing court had no choice of

remedy since specific enforcement of the plea agreement entitled the defendant to the same remedy as the opportunity to withdraw and replead:

> A breached plea agreement may be remedied by either specific performance of the agreement or by allowing the defendant to withdraw the plea. In this case, the agreement itself provides the remedy of withdrawal of the plea. Therefore, the option of specific performance entitles [the defendant] to the same remedy as withdrawal. It does not provide [the defendant] with the right to have the sentence determined at [the stipulated level] under the specific performance theory. Therefore, under the terms of the plea agreement, the case will be remanded to offer [the defendant] the opportunity to withdraw the plea.

Id. at 973. (Emphasis added.) (Internal citations omitted.)

The court of appeals suggested that its holding is consistent with *Mandell*, but the decisions are irreconcilable. *Mandell* clearly and unequivocally held that the sentencing court is bound by the parties' choice of remedy and lacks authority to choose an appropriate cure to remedy a breached plea agreement, whereas the court of appeals, following *American Bag*, allowed for the exercise of judicial discretion contrary to the express intentions and expectations of the parties. Accordingly, the ruling of the court of appeals is in direct conflict with *Mandell*.

More troubling than its misapprehension of Rule 11(e)(1)(C) and its rejection of *Mandell* is the effect of the

ruling of the court of appeals on the plea bargaining process. If the ruling is permitted to stand, plea agreements will lack resolve and finality. Any agreement, even an 11(e)(1)(C) agreement intended to eliminate doubt, is subject to judicial revision and second-guessing. The message to defendants is clear: execute a plea agreement at your peril because the promises contained therein may not be enforced. The advantages of plea bargaining will prove illusory and misleading, just as they did here, and the incentive for defendants to plead at all will be significantly diluted. Absent the assurance that they will get what they bargained for, defendants will be reluctant to participate in the plea bargaining process and will be dissuaded from entering into any bargain with the government, to the great detriment of the societal interest in encouraging the disposition of criminal charges by agreement between the prosecutor and the accused.

This Court has recognized that faithful observance of the requirements of Rule 11 and diligent enforcement of the terms of a plea agreement are indispensable to our criminal justice system which is so heavily dependent upon plea bargaining. *Santobello*, 404 U.S. at 260-262, 92 S. Ct. at 498-99. Society's interest in the early disposition of charges after plea discussions and the individual defendant's interest in receiving the benefit of his bargain mandate that promises made in consideration for the entry of a plea of guilty must be fulfilled. Therefore, to preserve the integrity of the plea bargaining process and encourage defendants to enter into binding plea agreements, this Court should consider this case and resolve the existing conflict among the courts of appeals by establishing a defendant's right to specific enforcement of a remedial provision in a binding plea agreement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-7224

UNITED STATES OF AMERICA
v.
WILLIAM GILCHRIST,
Appellant

On Appeal From The United States District Court
For The Middle District Of Pennsylvania
(D.C. Crim. No. 96-CR-0094)

Argued: July 25, 1997

Before: BECKER, MANSMANN, *Circuit Judges*, and HOEVELER, *Senior District Judge*.*

(Filed December 2, 1997)

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*Honorable William M. Hoeveler, Senior United States District Judge for the Southern District of Florida, sitting by designation.

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OPINION OF THE COURT

HOEVELER, *Senior District Judge,*

William Gilchrist appeals from a final judgment of conviction and sentence requesting that we vacate his sentence and permit him to withdraw the guilty plea he entered pursuant to a Rule 11(e)(1)(C) binding plea agreement. We find that the imposition of the additional condition of supervised release breached the plea agreement, but we will remand for the district court to determine whether to impose the sentence of the plea agreement or to permit Gilchrist to withdraw his plea.

I.

Appellant was charged with engaging in commercial bribery in violation of the Travel Act and conspiring to violate the Travel Act. Gilchrist, who operated a trucking company, was charged with paying kickbacks to Donald Finke, the transportation manager of Welch Foods, in order to continue doing business with Welch.

Following discussions with the government, Gilchrist agreed to plead guilty to a lesser charge, misprision of a felony, 18 U.S.C. § 4. He negotiated and executed a binding plea agreement with the Government pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure. According to this agreement Mr. Gilchrist was to be sentenced to a nine month term of incarceration and a one month period of home confinement. The plea agreement also called for the imposition of a $10,000 fine and a $50 assessment. The nine month prison term was greater than that provided for in the Guidelines for a violation of 18 U.S.C. § 4 (the applicable range for this offense is 0-6 months). Appellant agreed to this upward departure from the Guidelines in exchange for the government's dismissal of its two count indictment against him. Under the indictment the Appellant faced a possible penalty of 10 years incarceration and $500,000 in fines, as well as a term of supervised release and assessments, if he were convicted of both offenses. *Appellant's Appendix at 17a.* The parties further agreed that, if the district court rejected the stipulated sentence or imposed a more severe penalty, Mr. Gilchrist would be entitled to withdraw from the Plea Agreement and plead anew.

The district court accepted Mr. Gilchrist's guilty plea on December 11, 1996. Sentencing was scheduled for April

pending completion of his pre-sentence investigation report. At the April 22, 1997 sentencing, the district court imposed a sentence of 9 months incarceration, a $10,000 fine, a $50 assessment ***and a one year period of supervised release***, including one month home confinement. Mr. Gilchrist did not object to the court's sentencing at the hearing.

On April 30, 1997 Mr. Gilchrist filed a motion in the district court to correct sentence pursuant to Fed.R.Crim.P. 35(c). *Supplemental Appendix, at 10-26.* In its response the Government agreed that the court's sentence was not in line with the plea agreement and suggested that the period of supervised release be limited to one month. *Appellant's Appendix at 39a.* However, the district court did not rule on the motion within the seven day period following the imposition of Gilchrist's sentence, and thus no longer had authority to correct an excessive sentence pursuant to Fed.R.Crim.P. 35(c). On May 1, 1997, Gilchrist filed a Notice of Appeal. He moved for expedited disposition on his appeal on May 14, 1997. This motion was granted and his sentence imposed by the district court was stayed.

In his appeal Gilchrist argues that the sentence imposed by the district court is more severe than that stipulated to by the parties in the plea agreement. He further asserts that the district court's imposition of such a sentence resulted in the breach of the plea agreement. Therefore, Gilchrist contends that the case should be remanded to the district court to afford him the opportunity to withdraw his guilty plea and plead anew pursuant to the remedial provision in the plea agreement.

In response the government argues that because home detention may only be imposed as a special condition of supervised release, both parties reasonably expected the

district court to impose a period of supervised release pursuant to the plea agreement which provided for one month home detention. Moreover, the government asserts that, assuming the court's imposition of supervised release resulted in a breach of the plea agreement, the case should be remanded to the district court in order to afford it the opportunity to correct any error and fashion an appropriate remedy.

II.

The plea agreement at issue was executed pursuant to Fed.R.Crim.P. 11(e)(1)(C) which authorizes the government and the defendant to "agree that a specific sentence is the appropriate disposition of the case." Such a plea agreement may be distinguished from one executed pursuant to Fed.R.Crim.P. 11(e)(1)(B) where the government makes a recommendation, or agrees not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding on the court. At the time the plea is offered the court may accept or reject an 11(e)(1)(C) plea agreement, or may defer its decision until there has been an opportunity to consider the presentence investigation report. Fed.R.Crim.P. 11(e)(2). If the plea agreement is rejected, the court must afford the defendant an opportunity to withdraw his guilty plea. Fed.R.Crim.P. 11(e)(4); U.S.S.G. § 6B1.3. If the plea agreement is executed pursuant to Fed.R.Crim.P. 11(e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation the defendant nevertheless has no right to withdraw his plea. Fed.R.Crim.P. 11(e)(2). Under the specific provisions of the plea agreement in the instant case, both parties were afforded an opportunity to withdraw from the agreement.

The agreement states:

> If at sentencing the court fails to accept the stipulations of the parties, or imposes a sentence greater than that agreed to by the parties then the parties have the right to withdraw from this agreement and withdraw any guilty plea entered pursuant to this agreement.

Plea Agreement, ¶ 5 (emphasis added).

III.

The first question with which this Court is faced is whether or not the sentence imposed by the district court is "greater than that agreed to by the parties." There can be little argument as to this point. The plea agreement clearly stated that the parties agreed that the appellant would be sentenced to a term of nine (9) months incarceration, 1 month home detention, and a $10,000 fine. Plea agreement ¶ 5. At sentencing the district court imposed a sentence of nine months incarceration, twelve months of supervised release, one month of home detention and a $10,000 fine.[1]

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[1] Presumably, the district court believed that it was carrying out the terms of the plea agreement when it imposed its sentence. During the sentencing hearing the court initially recited the sentence as it appeared in the plea agreement. However, at the time the sentence was imposed the court included the twelve month period of supervised release. That the court believed it was following the plea agreement is further evidenced by Appellant's Judgment and Commitment. While the court included the necessary information to ensure the imposition of one year of supervised release in the "supervised release" section of the document, under "Additional Reasons for Departure from the Guideline Range" it listed the sentence exactly as it appeared in the plea agreement.

Regardless of the intentions of the district court, the sentence imposed was clearly greater than that set out in the plea agreement. It is well settled that supervised release constitutes punishment. *United States v. Dozier*, 1997 WL 401318 (3d Cir. (N.J.)) 8. In *Dozier* this Court explained:

> Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act. A defendant on supervised release is subject to various terms and conditions which restrict his freedom and make him vulnerable to further punishment should he violate them. Such subsequent punishment may again include more imprisonment and more supervised release.

Id. Thus, on its face, a sentence including a twelve month period of supervised release is greater than that agreed to by the parties.

We next must determine whether or not the imposition of a sentence including a twelve month period of supervised release resulted in a breach of the plea agreement. Plea agreements are contractual and therefore are to be analyzed under contract law standards. *United States v. Moscahlaidis*, 868 F.2d 1357, 1361 (3d Cir. 1989). "In determining whether a plea agreement has been broken, courts look to 'what was reasonably understood by [the defendant] when he entered his plea of guilty.'" *United States v. Arnett,* 628 F.2d 1162, 1164 (9th Cir. 1979) (*quoting United States v. Crusco*, 536 F.2d 21, 27 (3d Cir. 1976). The government assets that a period of home detention may only be imposed as a special condition of either supervised release or probation. *See* U.S.S.G. §

5F1.2. Therefore, the government maintains that when Appellant entered into a plea agreement providing for one month home detention, the imposition of a period of supervised release was, or should have been, within his reasonable expectations.

Assuming, without deciding, that the government's contention that home detention may not be imposed without a corresponding period of supervised release or probation is correct, we still find that the twelve month period of supervised release imposed by the district court was not within the reasonable expectations of the appellant. The government asserts that U.S.S.G. § 5D1.2(a)(3) mandates the imposition of a one-year period of supervised release for a Class E felony such as misprision.[2] However, for a term of incarceration lasting less than one year, such as that in the instant case, the imposition of a term of supervised release is discretionary. U.S.S.G. § 5D1.1(b). Moreover, Rule 11 limits the discretion afforded the district court under the Sentencing Guidelines. An 11(e)(1)(C) plea agreement, once accepted, binds the district court notwithstanding departures from the applicable guidelines. U.S.S.G. § 6B1.2(c) (authorizing sentencing court to accept Rule 11(e)(1)(C) plea agreement if agreed sentence is within applicable guideline range or departs from applicable guideline range for justifiable reasons).

Furthermore, the record in this case demonstrates that the imposition of a twelve month period of supervised release was neither express nor implied. The plea agreement itself makes no mention of supervised release. Similarly, the

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[2] Under U.S.S.G. § 5D1.2(a)(3) *if* a period of supervised release is ordered, the length of such term is one year for a defendant convicted of a Class E felony, such as misprision. (emphasis added.)

stipulated sentence presented to the district court at the change of plea hearing was silent as to supervised release. Finally, the government did not refer to any period of supervised release in its presentation of the plea agreement to the court at sentencing. Based on the record before this court we find that the imposition of a twelve month period of supervised release was beyond the reasonable expectations of appellant. Therefore, by imposing a sentence greater than that to which the parties agreed, the district court, although perhaps inadvertently, caused the plea agreement to be breached.

IV.

The second question we must address is whether to afford appellant the opportunity to withdraw his guilty plea and replead, or to remand the case to the district court to allow it the opportunity to fashion an appropriate remedy. The government is correct in noting that the well-settled rule in this Circuit is that where a plea agreement has been breached, the district court, not the defendant, is to decide in the first instance whether to grant specific performance of the plea agreement or withdrawal of the guilty plea. *See e.g., United States v. Torres*, 926 F.2d 321, 327 (3d Cir. 1991); *United States v. Moscahlaidis*, 868 F.2d 1357, 1363 (3d Cir. 1989); *United States v. Martin*, 788 F.2d 184, 188 (3d Cir. 1986); *United States v. American Bag & Paper Corp.*, 609 F.2d 1066, 1068 (3d Cir. 1979).

In its brief the government places particular emphasis on our opinion in *American Bag*. In that case the defendant corporation pleaded nolo contendere to a single-count indictment charging a violation of the Sherman Act, 15 U.S.C. § 1 (1976), pursuant to an 11(e)(1)(B) plea agreement. The agreement called for the government to

recommend a fine of $500,000 to be paid in annual installments of $50,000. *Id.* at 1067. The contract further provided that "if [the court] should for any reason determine not to follow the government's recommendation, the corporation would be afforded the opportunity to withdraw the plea of nolo contendere." *Id.* at 1067. While both parties satisfied their obligations under the agreement, the district court in addition to imposing the recommended fine also imposed interest on the unpaid balance at 6% per annum. Because the plea agreement was silent on the matter of interest, the defendant appealed the sentence arguing that the imposition of interest constituted a breach of the plea agreement, and therefore the corporation was entitled to withdraw its plea. This Court remanded the matter to the district court for clarification regarding whether it had intended to reject the plea agreement or not.[3] On remand the district court refused to vacate the sentence and allow defendant to withdraw its guilty plea, and instead, vacated the interest portion of the judgment. The defendant's subsequent appeal to this Court claiming it was entitled to a withdrawal of the guilty plea despite the fact that the district court had vacated the interest portion of the sentence was denied. This Court affirmed the district court's election to delete the offending portion of its sentence and rejected defendant's claim of entitlement to withdrawal of the plea.

Appellant correctly points out that the plea agreement in *American Bag* was executed pursuant to 11(e)(1)(B), while

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[3] The initial panel in *American Bag* remanded the case to the district court to consider Defendant's Motion to Correct which had been filed after the filing of the notice of appeal, but before the appeal had been heard. In its original motion, Defendant asked the court to vacate the interest portion of its judgment, but did not move for withdrawal of its plea. Upon remand American Bag argued for withdrawal of its plea.

the agreement in the instant case was executed pursuant to 11(e)(1)(C). However, upon closer examination the two agreements are very similar, and therefore the *American Bag* decision is indeed instructive. While nominally the plea agreement in *American Bag* was an 11(e)(1)(B) agreement, the inclusion of a provision allowing the defendant corporation the opportunity to withdraw its plea if the court did not follow the government's recommendation, in effect, converted the plea contract into an 11(e)(1)(C) agreement.

In essence, the parties in *American Bag*, as they would pursuant to an 11(e)(1)(C) plea agreement, presented a stipulated sentence to the district court: American Bag would enter a plea of nolo contendere, cooperate fully with the government, and pay a fine of $500,000 in $50,000 annual installments. The parties further agreed that if the court did not accept this "stipulated" sentence, American Bag would be free to withdraw its plea. Thus, the parties granted to defendant the same ability to withdraw a plea provided in Rule 11(e)(1)(C) by including a withdrawal provision in their plea agreement. Moreover, both the district court and this Court appear to have treated the plea agreement as if it had been executed pursuant to 11(e)(1)(C). The district court acknowledged the withdrawal provision contained in the agreement when it stated: "'(If) the court believes that the recommended sentence is inadequate, the court will allow the entry of a plea of nolo contendere to be withdrawn on behalf of American Bag & Paper Corporation.'" *Id.* at 1067 (quoting the district court). Similarly, this Court observing that the record was unclear as to whether the district court was affirmatively rejecting

the plea agreement, remanded the case for clarification.[4] *Id.* at 1068. Had this Court ignored the plea withdrawal provision and read the agreement in *American Bag* as a traditional 11(e)(1)(B) plea agreement, it would have been under no obligation to remand the case to the district court. It could have instead interpreted the district court's imposition of interest as an authorized modification of the sentence recommended by the government in the plea agreement.

As noted above the record in the instant case suggests that it is unclear whether the district court intended to reject the terms of the plea agreement as proposed by the parties. In *American Bag* we concluded that:

> [w]hen, as here, the court does not intend to reject the terms of a plea bargain but, nevertheless, imposes a sentence allegedly inconsistent with the terms of that plea bargain, it appears consistent with the provisions of Fed.R.Crim.P. 11(e)(4), to allow the district court, in the first instance, the opportunity to correct its own error. Thus the district court, upon appropriate

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[4] It is interesting to note that in the instant case Gilchrist also filed a Rule 35(c) motion seeking to correct the sentence imposed by the district court. Like the defendant in *American Bag*, Gilchrist did not move to withdraw his plea in his Rule 35(c) motion, but rather sought an order conforming his sentence to the provisions of the plea bargain. It is particularly worth noting that in support of his motion to correct Gilchrist relies on this Court's opinion in *American Bag*. *See Defendant's Memorandum of Law in Support of Motion to Correct Sentence Pursuant to Fed. R. Crim. P. 35(c), Supplemental Appendix, at 24*. However, following the filing of his notice of appeal, Gilchrist moved to withdraw his Rule 35 motion.

> motion, may choose to conform the sentence to the terms of the plea bargain or allow withdrawal of the plea.

In spite of the fact that the plea agreement in the instant case was executed pursuant to 11(e)(1)(C) as opposed to 11(e)(1)(B), for the reasons stated above, we still find the reasoning in *American Bag* applicable.[5]

V.

Upon consideration of the record, we will vacate the judgment and sentence of the district court. The matter shall be remanded to the district court to determine whether the appropriate remedy is to require specific performance of the

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[5] Appellant relies on the Sixth Circuit's opinion in *United States v. Mandell*, 905 F.2d 970 (6th Cir. 1990). In that case the defendant entered a plea of guilty pursuant to a plea agreement specifying a precise range and a stipulation including an agreed upon offense level. Mandell's plea agreement, like that in the instant case, included a provision authorizing the defendant to withdraw his plea if the sentencing court departed from the stipulations of the parties. *Mandell*, 905 F.2d at 971. The sentencing court accepted the plea, but upon review of the presentence report, increased the offense level. The Sixth Circuit held that the plea agreement had been breached. The court noted that generally a breached plea agreement was remedied by either specific performance or by allowing the defendant to withdraw the plea. The *Mandell* court concluded that the agreement itself provided for the remedy of withdrawal of the plea, and therefore under the circumstances the option of specific performance entitled the defendant to the same remedy as withdrawal. *Id.* The court further determined that the agreement did not provide Mandell with the right to have his sentence determined at the stipulated offense level under a theory of specific performance. Consistent with our opinion in *American Bag*, we leave the initial determination of whether Gilchrist is entitled to specific performance of his plea agreement, and thus the sentence to which he stipulated, to the district court.

agreement or permit the appellant to withdraw his plea. Unless the court can, and is disposed to, impose the sentence agreed to by the parties in accordance with applicable statutes and guidelines, appellant should be afforded the opportunity to withdraw his plea and plead anew.

BECKER, *Circuit Judge*, concurring dubitante.

I join in the majority opinion insofar as it vacates the judgment of the district court, but I have problems with its instructions on remand. The majority orders that the matter

> be remanded to the district court to determine whether the appropriate remedy is to require specific performance of the agreement or permit the appellant to withdraw his plea. Unless the court can, and is disposed to, impose the sentence agreed to by the parties in accordance with applicable statutes and guidelines, appellant should be afforded the opportunity to withdraw his plea and plead anew.

In my view, this discussion does not give the district court adequate guidance as to what might constitute a proper sentence within the framework of the plea bargain.

The majority has properly concluded that the sentence of twelve months supervised release violated the plea agreement.[1] Perhaps the majority has in mind that the

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[1] The district court's decision to include a twelve month term of supervised release in Gilchrist's sentence is not the non-sequitur that it appears to be at first glance. Although under U.S.S.G. § 5D1.1(b) the imposition of a term of supervised release is discretionary where the term

district court on remand might reduce the term of supervised release to one month conditional on one month home confinement. While that would be a legal sentence, I think that it would breach the plea bargain.

The majority's analysis, however, suggests that such a sentence could be imposed on remand. It reasons that

> Plea agreements are contractual and therefore are to be analyzed under contract law standards. *United States v. Moscahlaidis*, 868 F.2d 1357, 1361 (3d Cir. 1989). "In determining whether a plea agreement has been broken, courts look to 'what was reasonably understood by [the defendant] when he entered his plea of guilty.'" *United States v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979) (*quoting United States v. Crusco*, 536 F.2d 21, 27 (3d Cir. 1976)). The government asserts that a period of home detention may only be imposed as a special condition of either supervised release or probation. *See* U.S.S.G. § 5F1.2. *Therefore, the government maintains that when Appellant entered into a plea agreement*

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of incarceration is less than one year, under U.S.S.G. § 5D1.2(a)(3) *if* a period of supervised release is ordered, the length of such term is one year for a defendant convicted of a Class E felony. When this is coupled with the fact that home detention may only be imposed as a condition of probation or supervised release, *see* U.S.S.G. § 5F1.2, it appears entirely possible that the District Court felt that it was *required* to impose a one year term of supervised release in order to effectuate the plea agreement. In fact, it was not so required since under U.S.S.G. § 6B1.2, the court may accept an 11(e)(1)(C) plea agreement if it departs from the guideline range "for justifiable reasons."

> *providing for one month home detention, the imposition of a period of supervised release was, or should have been, within his reasonable expectations.*

I am unsure that the underlined statement is correct. I have substantial reservations about importing into a plea bargain a kind of punishment that the parties did not appear to contemplate.[2] Here neither the government nor the defense apparently considered the possibility of supervised release. Perhaps they thought that home detention could be free-standing. At all events, they did not mention supervised release in the plea agreement.

Perhaps the parties reasonably should have expected that home confinement carried with it supervised release. While contract standards may generally apply, I believe that courts must be more circumspect in divining the reasonable expectations of a defendant who enters into a plea agreement than we might be in the case of a contract that does not implicate an individual's liberty interest. Indeed, if courts construed plea agreements narrowly, as I think they should, the message would be clear that "expectations" such as the one at issue in this case must appear in the text of the agreement.

I would also be troubled if the majority has in mind that the district court might sentence Gilchrist to one month

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[2] As the majority correctly points out, it is well settled that supervised release constitutes punishment. *See* Maj. op. at 5. For a list of the recommended conditions of supervised release, which can convert otherwise legal activities like wandering into an unsavory bar, talking with felons or other disreputable characters, or drinking too much into grounds for re-incarceration, *see* U.S.S.G. § 5B1.4.

home confinement without supervised release. While the majority declines to reach this question, I believe that such a sentence would be illegal. Under U.S.S.G. § 5F1.2 home detention "may be imposed as a condition of probation or supervised release". I read this as clearly indicating that home detention is not a free-standing sentence and thus that the District Court is without authority to impose it on Gilchrist as such.[3]

Notwithstanding these comments, I am not sufficiently sure that the majority is wrong that I style this opinion a dissent, which would require me to vote to remand with directions to vacate the plea of guilty and permit the defendant to go to trial.[4] I therefore concur *dubitante*.

A True Copy:
Teste:

Clerk of the United States of Appeals
for the Third Circuit

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[3] If, of course, the district court were simply to impose the nine month prison term and the fine and assessment but with no supervised release and no home confinement, there would be no problem. And, obviously, there would be no problem if the court permits Gilchrist to withdraw his plea.

[4] It seems clear that Gilchrist believes that the government no longer can prove a case against him at trial. I presume that a key witness has "gone south" on the government.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7224

UNITED STATES OF AMERICA

v.

WILLIAM S. GILCHRIST, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above case be, and it is hereby stayed until February 11, 1998.

/s/ Edward R. Becker
Circuit Judge

Date: Jan 22 1998
dw/cc: DTB
TJH
MMM
LNG

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

WILLIAM GILCHRIST

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number:
1:96CR00094-001
Thomas J. Hanlon, Esquire
Defendant's Attorney

THE DEFENDANT:

_X_ pleaded guilty to count(s) **1 to Superseding Information**

__ pleaded nolo contendere to count(s)_____ which was accepted by the court.

__ was found guilty on count(s)_____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 4	Withholding information on a crime	01/01/1992	1S

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__ The defendant has been found not guilty on count(s)___

_X_ Count(s) **1, 2 Original Indictment** is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:**178-34-3036**
Defendant's Date of Birth:**08/01/1942**
Defendant's USM No.:**03991-067**
Defendant's Residence Address:
21 Alpine Drive
Moosic, PA 18507
Defendant's Mailing Address:
21 Alpine Drive
Moosic, PA 18507

04/22/1997
Date of Imposition of Judgment
/s/ William W. Caldwell
Signature of Judicial Officer
William W. Caldwell
U.S. District Judge
Name & Title of Judicial Officer

4/22/97
Date

Certified from the record
Date 4/22/97
Mary E. D'Andrea, Clerk
Per/s/
Deputy Clerk

DEFENDANT: **William Gilchrist**
CASE NUMBER: **1:96CR00094-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **9 month(s)**.

__ The court makes the following recommendations to the Bureau of Prisons:

__ The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district:

__ at _____ a.m./p.m. on _____.
__ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

X before 2 p.m. on **06/16/1997**.
__ as notified by the United States Marshal.
__ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

DEFENDANT: **William Gilchrist**
CASE NUMBER: **1:96CR00094-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **1 year(s)**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

— The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the Court or probation officer;
2) the defendant shall report to the probation officer, and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days

prior to any change of residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

See Additional Standard Conditions of Supervision - Page 5

DEFENDANT: **William Gilchrist**
CASE NUMBER: **1:96CR00094-001**

SPECIAL CONDITIONS OF SUPERVISION

As a special condition, the defendant shall remain for a period of one month at his residence, with electronic monitoring, unless given permission in advance by the Probation Officer to be elsewhere. The defendant shall maintain a telephone with no special features at his place of residence for the above period. Provisions shall be made by the Probation Officer for the defendant's absence from his residence for employment, medical treatment and religious services. In view of the defendant's financial condition, IT IS FURTHER ORDERED that he shall pay the cost of electronic monitoring program at a rate not to exceed $4.97 per day.

DEFENDANT: **William Gilchrist**
CASE NUMBER: **1:96CR00094-001**

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

14) the defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon;
15) the defendant shall participate in a program of testing and treatment for drug abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.

DEFENDANT: **William Gilchrist**
CASE NUMBER: **1:96CR00094-001**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 50.00**	**$10,000.00**	**$**

__ If applicable, restitution amount ordered pursuant to plea agreement ..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

__ The interest requirement is modified as follows:

RESTITUTION

__ The determination of restitution is deferred until __ _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

__ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: **William Gilchrist**
CASE NUMBER: **1:96CR00094-001**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A X in full immediately; or

B __ $_____ immediately, balance due (in accordance with C, D, or E); or

C __ not later than _____; or

D __ in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E __ in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $_____ over a period of _____ year(s) to commence ____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The fine and special assessment are to be paid through the Clerk of Court's Office, P.O. Box 983, Harrisburg, PA 17108.

__ The defendant shall pay the cost of prosecution.

__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: **William Gilchrist**
CASE NUMBER: **1:96CR00094-001**

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

__ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: **2**
Criminal History Category: **I**
Imprisonment Range: **0 to 6 months**
Supervised Release Range: **one year**
Fine Range: $ **100.00** to $ **5,000.00**

__ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ **0.00**

__ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

__ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

__ Partial restitution is ordered for the following reason(s):

__ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

__ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

_X_ The sentence departs from the guideline range:

__ upon motion of the government, as a result of defendant's substantial assistance.

_X_ for the following specific reason(s).

See Additional Reasons for Departure From the Guideline Range - Page 9

DEFENDANT: **William Gilchrist**
CASE NUMBER: **1:96CR00094-001**

ADDITIONAL REASONS FOR DEPARTURE FROM THE GUIDELINE RANGE

The Court finds that in view of the Rule 11(e)(1)(C) agreement, a sentence of nine months imprisonment, one month home detention and a fine of $10,000 is a fair and just resolution and satisfies the ends of justice.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-7224

UNITED STATES OF AMERICA

vs.

WILLIAM S. GILCHRIST,
Appellant
(D.C. Crim. No. 96-CR-0094)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDELL, Circuit Judges, and HOEVELER,* District Judge.

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: JAN 05 1998
DW/cc: DTB
TJH
MMM
LNG

*As to panel rehearing only.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	) CRIMINAL NO.
	) 3:CR-96-094
v.	)
	)(JUDGE CALDWELL)
WILLIAM GILCHRIST	)

PLEA AGREEMENT

The following plea agreement is entered into by and between the United States Attorney for the Middle District of Pennsylvania and the above-captioned defendant. Any reference to the United States or to the Government in this Agreement shall mean the office of the United States Attorney for the Middle District of Pennsylvania.

The defendant, as well as counsel for both parties, understand that the United States Sentencing Commission Guidelines which took effect on November 1, 1987, as amended, will apply to the offenses to which the defendant is pleading guilty, since that offense was completed after the effective date of the implementation of the Guidelines.

1. The defendant agrees to waive indictment by a grand jury and plead guilty to a felony information which will be filed against the defendant by the United States Attorney for the Middle District of Pennsylvania. That information will charge the defendant with a violation of Title 18, United States Code, Section 4, misprision of a felony. The maximum penalty for that offense is imprisonment for a period of 3 years, a fine of $250,000.00 a term of supervised release to be determined by the court,

the costs of prosecution, denial of certain federal benefits as well as an assessment in the amount of $50.00. At the time the guilty plea is entered, the defendant shall admit to the Court that the defendant is, in fact, guilty of the offense charged in the information.

2. At the time of sentencing on the information described above, the United States agrees to move for dismissal of the indictment filed in this case.

3. The defendant understands that the Court will impose a special assessment of $50.00 pursuant to the provisions of Title 18, United States Code, Section 3013. No later than the date of sentencing, the defendant or defendant's counsel shall mail a check in payment of the special assessment directly to the Clerk, United States District Court Middle District of Pennsylvania. This check should be made payable to "Clerk, United States District Court". Counsel for the defendant shall provide a copy of the special assessment check to the United States Attorneys Office for the Middle District of Pennsylvania at the time of sentencing certifying compliance with this provision of the plea agreement. A failure to make this payment, or to pay with insufficient funds, will be treated as a breach of this plea agreement and may result in further prosecution or the filing of additional criminal charges.

4. The United States Attorney's Office for the Middle District of Pennsylvania agrees that it will not bring any other criminal charges against the defendant directly arising out of the defendant's involvement in the offense described above. However, nothing in this agreement will limit prosecution for criminal tax charges, if any, arising out of those offenses.

5. Pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, the government and the defendant stipulate and agree that the defendant be sentenced to a term of imprisonment of 9 months incarceration, 1 month home detention, and $10,000 fine. If at sentencing the court fails to accept the stipulations of the parties, or imposes a sentence greater than that agreed to by the parties then the parties have the right to withdraw from this agreement and withdraw any guilty plea entered pursuant to this agreement.

6. The defendant also understands that the United States will provide to the United States Probation Office all information in its possession which the United States deems relevant regarding the defendant's background, character, cooperation, if any, and involvement in this or other offenses.

7. The defendant understands that pursuant to the United States District Court for the Middle District of Pennsylvania "Policy for Guideline Sentencing" both the United States and defendant must communicate to the probation officer within fifteen (15) days after disclosure of the pre-sentence report any objections they may have as to material information, sentencing classifications, sentencing guideline ranges and policy statements contained on or omitted from the report. The defendant agrees to meet with the United States at least five (5) days prior to sentencing in a good faith attempt to resolve any substantive differences. If any issues remain unresolved, they shall be communicated to the probation officer for his inclusion on an addendum to the pre-sentence report. The defendant understands that unresolved substantive objections will be decided by the court at the sentencing hearing where the standard of proof will be a preponderance of the evidence. Objections by the

defendant to the pre-sentence report or the Court's rulings, will not be grounds for withdrawal of a plea of guilty.

8. Nothing in this agreement shall restrict or limit the nature or content of the United States's motions or response to any motions filed on behalf of the defendant. Nor does this agreement in any way restrict the government in responding to any request by the court for briefing, argument or presentation of evidence regarding the application of the Sentencing Guidelines to the defendant's conduct, including but not limited to, requests for information concerning possible sentencing departures.

9. Nothing in this agreement shall bind any other federal, state or local enforcement agency.

10. The United States is entering into this Plea Agreement with the defendant because this disposition of the matter fairly and adequately addresses the gravity of the series of offenses from which the charges are drawn, as well as the defendant's role in such offenses, thereby serving the ends of justice.

11. This document states the complete and only Plea agreement between the United States Attorney for the Middle District of Pennsylvania and the defendant in this case, and is binding only on the parties to this agreement, supersedes all prior understandings, if any, whether written or oral, and cannot be modified other than in writing that is signed by all parties or on the record in Court. No other promises or inducements have been or will be made to the defendant in connection with this case, nor have any predictions or threats been made in connection with this plea.

12. The original of this agreement must be signed

by the defendant and defense counsel and received by the United States Attorney's Office on or before 5:00 p.m., December 9, 1996, otherwise the offer shall be deemed withdrawn.

13. None of the terms of this agreement shall be binding on the Office of the United States Attorney for the Middle District of Pennsylvania until signed by the defendant and defense counsel and until signed by the United States Attorney.

ACKNOWLEDGMENTS

I have read this agreement and carefully reviewed every part of it with my attorney. I fully understand it and I voluntarily agree to it.

12/7/96 — Dated

/s/ William Gilchrist Jr. — Defendant

I am the defendant's counsel. I have carefully reviewed every part of this agreement with the defendant. To my knowledge my client's decision to enter into this agreement is an informed and voluntary one.

12/9/96

/s/ Thomas J. Hanlon
Counsel for Defendant

12/9/96

/s/ David M. Barasch
DAVID M. BARASCH
United States Attorney